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MALAYAN BANKING BHD v. PMP GALVANIZERS SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CIVIL SUIT NO: KCH-22NCC-14-11-2014]
B 6 AUGUST 2015

BANKING: *Banking and customer – Amount outstanding – Default in payment – Service of notice of demand – Whether valid – Reasonable cause of action – Whether disclosed – Whether statement of claim defective – Whether amount due* C *and owing pleaded – Restructuring and rescheduling of facilities – Whether contradicted with amounts stated in statement of claim – Whether statement from plaintiff's officer certifying amount of indebtedness shall be conclusive evidence of amount due and payable – Whether plaintiff could proceed with foreclosure proceedings – Whether costs awarded to plaintiff considered – Whether defendant's* D *statement of defence struck out – Rules of Court 2012, O. 18 r. 19*

CIVIL PROCEDURE: *Costs – Solicitor and client – Whether defendant agreed to indemnify plaintiff's legal costs – Whether plaintiff had to prove actual costs – Whether costs awarded based on Advocates' Remuneration Rules 1988 of Sarawak*

E The plaintiff granted three types of banking facilities to the first defendant, *ie*, a term loan of RM6,330,000, an overdraft of RM2,400,000 and a letter of credit for RM18,000,000. An agreement as well as a fixed debenture over all the plants and machineries belonging to the first defendant were executed by the parties in order to formalise the grant of the said facilities. The second, third and fourth defendants guaranteed the due performance of the F first defendant and had executed the corporate guarantee and letters of guarantee. The said facilities were subsequently restructured three times by separate letters of offer. The plaintiff alleged that the first defendant defaulted in the repayments of both the overdraft and the term loan. Since the alleged sum was not settled, the plaintiff commenced this suit and G claimed for the exact sum demanded together with interest. In addition, the plaintiff claimed for costs on solicitor-client basis based on the 13th Schedule of the Advocates' Remuneration Rules 1988 of Sarawak ('the Schedule'). The defendants filed a joint statement of defence and alleged that (i) there was no valid service of the notices of demand on the second to H fourth defendants; (ii) the statement of claim was defective since it did not disclose a reasonable cause of action; (iii) the amount due and owing under the two facilities were not pleaded; (iv) the commencement of the action was premature; and (v) the solicitor-client costs as pleaded by the plaintiff was excessive and/or unreasonable. In relation to costs, the plaintiff I acknowledged that the computation of the costs on a solicitor and client basis should be RM99,347.95 and not RM99,847.95 and requested the court to amend the sum and replace it with the correct amount. The plaintiff

filed an application under O. 18 r. 19 of the Rules of Court 2012 ('ROC') to strike out the defence on the grounds that (a) it was scandalous, frivolous or vexatious; (b) it may prejudice, embarrass or delay the fair trial of the action; or (c) it was otherwise an abuse of the court's process.

Held (allowing plaintiff's application with costs):

(1) The evidence of posting of the letters of demand by registered post to the second and fourth defendants was exhibited in the affidavit in support. Further, cl. 22 of the guarantees deemed that such a demand was served if it was made by pre paid registered post or ordinary post on the fifth day following its posting. The case of *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* showed the effectiveness of such a deeming clause in a banking agreement such as this. (para 8)

(2) The first mentioned interest pleaded in the statement of claim had been varied in the fourth letter of offer when the plaintiff further approved the restructuring and rescheduling of the said facilities. In the fourth letter of offer, the interest rate was clearly stated as BLR and 2% per annum for the overdraft and BLR and 1.5% per annum for the term loan. The default interest at the rate of 1% per annum was also provided in cl. 20.4 of the facility agreement. Hence, there was no unexplained contradiction in the pleading. The plaintiff had pleaded their full reliance on the terms of the fourth letter of offer and the facilities agreement in the statement of claim (*Malayan Banking Bhd v. Yeo Sun Tong*; refd). (para 9)

(3) The corporate guarantee of the second defendant and the individual guarantee of the third to fourth defendants were included in the facilities agreement. The defendants had agreed that a statement from an officer of the plaintiff certifying the amount of indebtedness shall be conclusive evidence of the amount due and payable (*Cempaka Finance Bhd v. Ho Lai Ying & Anor*; foll). (para 10)

(4) The default on repayments of the banking facilities by the first defendant and all the defendants' failure to meet the demands made had been pleaded and these were the facts upon which the plaintiff's cause of action rests. The date and the amount owing had also been pleaded and the certificate of indebtedness as well. As such, the statement of claim was not defective. (para 11)

(5) The facilities agreement, *inter alia*, stipulated that the plaintiff was entitled to commence concurrent proceedings or proceed with simultaneous or contemporaneous actions against the defendants for a monetary claim as well as a foreclosure proceeding against the charged plant and machinery. The plaintiff was supported by the contractual

provisions and case law to commence this action against the defendants despite cl. 14 of the fixed debenture which provides that the first defendant was only liable for the shortfall between the value or proceeds from the sale of the charged property and the outstanding loan amount, if any. (paras 12 & 14)

(6) The defendants agreed in the agreement and the guarantees to indemnify and bear the plaintiff's legal costs and charges resulting from their default. If the costs claimed by the plaintiff was over and above that prescribed from the computation in the Schedule, then it would be subject to proof. Otherwise, a strict reliance on a piece of legislation was fair and should be allowed. Since the oral amendment sought was to the advantage of the defendants, this court would allow it since O. 18 r. 19(1) of the ROC gives the court the power to either strike out or amend any pleading. It was plain and obvious to invoke the summary process under the said order. (paras 16, 18 & 19)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(foll)***

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Malayan Banking Bhd v. Yeo Sun Tong [1999] 4 CLJ 425 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1), O. 59 r. 22(1)(c)(iv)

For the plaintiff - Norman Liew; M/s Tan, Yap & Tang
For the defendants - Andy Tan Tung Sii; M/s Andy And Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Rhodzariah Bujang J:

[1] The first defendant was a company producing galvanised steel sheets and coils. Pursuant to its acceptance of a letter of offer dated 17 April 2006, the first defendant company was granted three types of banking facilities by the plaintiff – a term loan for RM6,330,000, an overdraft of RM2,400,000 and a letter of credit for RM18,000,000. An agreement as well as a fixed debenture over all its plants and machineries were executed by the parties on 24 July 2006, formalising the grant of the said facilities. The second, third and fourth defendants guaranteed the due performance of the first defendant under the said agreement by their execution of the corporate guarantee and letters of guarantee, respectively, all similarly dated 24 July

2006. The said facilities were subsequently restructured three times by separate letters of offer dated 11 July 2007, 21 July 2009 and 27 June 2011. The plaintiff alleged that the first defendant defaulted in the repayments of both the overdraft and term loan. Thus by letters of demand issued by their advocates dated 28 February 2014, the plaintiff demanded repayment of the amount outstanding under the said facilities in the sum of RM7,384,794.68 and with interest as at 28 February 2014.

[2] Similarly, the second to fourth defendants were issued with letters of demand in the same terms but dated 27 March 2014. They all failed to accede to the demands made and on 9 April 2014, pursuant to the terms of the debenture, the plaintiff appointed two receivers from Deloitte Corporate Solutions Sdn Bhd, who on the same day took possession of the first defendant's plant and machineries but to date have yet to sell the same. Thus, by a writ of summons and statement of claim dated 27 November 2014, the plaintiff claimed for the exact sum demanded together with the interest particularised as follows:

Facilities	Interest
(i) Term Loan (TL)	RM3,464,297.39 together with the interest at the rate of 1.50% per annum above Base Lending Rate currently fixed at 6.85% per annum calculated on monthly rest plus default l0 margin of 1.00% per annum.
(ii) Overdraft (OD)	RM3,920,497.29 together with the interest at the rate of 2.00% per annum above Base Lending Rate currently fixed at 6.85% per annum calculated on daily rest plus default margin of 1.00% per annum.

[3] ln addition, the plaintiff claimed for costs on solicitor-client basis based on court fees and the 13th Schedule of the Advocates Remuneration Rules 1988.

[4] The defendants filed a joint statement of defence alleging that:

(i) there were no valid service of the notices of demand on the second to fourth defendants.

(ii) the statement of claim was defective because it does not disclosed a reasonable cause of action since the amount due and owing under the two facilities were not pleaded.

(iii) the valuation report from Henry Butcher Malaysia Sdn Bhd shows that as at 7 February 2007, the value of the plants and its machineries was RM80 million which amount for exceeds of the sum claimed in this case and therefore the commencement of the action is premature, a non-starter or an abuse of the court's process.

(iv) the solicitor-client cost of RM99,847.95 pleaded by the plaintiff is excessive and/or unreasonable.

[5] The plaintiff has filed an O. 18 r. 19 of Rules of Court 2012 to strike out the said defence on the grounds that:

(i) it is scandalous, frivolous or vexatious.

(ii) it may prejudice, embarrass or delay the fair trial of the action.

(ii) or is otherwise an abuse of the court's process.

[6] The first affidavit in support of the plaintiff, I must state, exhibited all the documents I mentioned above with regards to the banking facilities granted and guaranteed. The valuation report of Henry Butcher is in the third defendant's affidavit in opposition affirmed on 5 March 2015.

[7] I will structure my ruling along the defences which I particularised above.

Non-Service Of Letters Of Demand

[8] The evidence of posting of the letters of demand by registered post to the second and fourth defendants are part of exh. W13 to the affidavit in support of Wan Rosmawati Wan lbrahim affirmed on 10 February 2015. Given that clear evidence, the defendant's counsel, Mr Andy Tan wisely did not address this defence in his submission in reply to that of Mr Norman Liew, counsel for the plaintiff. Additionally, cl. 22 of the guarantees executed by them deemed that such a demand is served if made by pre-paid registered post or ordinary post on the fifth day following its posting. The Supreme Court case of *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1; [1994] 1 MLJ 413 was rightly raised by Mr Norman Liew to show the effectiveness of such a deeming clause in a banking agreement such as this.

Defective Statement Of Claim

[9] In his written submission, Mr Andy Tan said the plaintiff did not properly plead in the body of its statement of claim, the claim of interest for both the facilities which for the term loan was merely pleaded in the words I have reproduced earlier. This is inconsistent, he said with prayer 24(a)(i) and (ii) of the statement of claim where the interest is stated as 1.5% per annum above BLR plus default margin of 1% per annum for the term loan and 2% per annum above BLR plus default margin of 1% per annum, respectively for the overdraft. He submitted that this is a triable issue for the court. I would respectfully beg to differ. As Mr Norman Liew for the plaintiff rightly pointed out in his submission in reply, the first mentioned interest pleaded in para. 7(a) of the statement of claim which was a term in the first letter of offer has been varied in the fourth letter of offer when the plaintiff further approved the restructuring and rescheduling of the said

facilities and which the defendant had accepted (see exh. W9 of the affidavit in support of Wan Rosmawati affirmed on 10 February 2015). ln the fourth letter of offer, the interest rate was clearly stated as BLR and 2% per annum for the overdraft and BLR and 1.5% per annum for the term loan. Default interest at the rate of 1% per annum is also provided in cl. 20.4 of the facility agreement dated 24 July 2006. There is therefore no unexplained contradiction in the pleading as in the case of *Malayan Banking Bhd v. Yeo Sun Tong* [1999] 4 CLJ 425 cited by Mr Andy Tan because plaintiff has pleaded, in the body of the statement of claim their full reliance on the terms of said fourth letter of offer and facilities agreement dated 24 July 2006 in paras. 10, 11 and 15, thereof.

[10] The plaintiff however has included in the facilities agreement (cl. 27.1), the corporate guarantee of the second defendant (cl. 11) and the individual guarantee of the third to fourth defendants (cl. 11), a term what is commonly or popularly known as the conclusive evidence clause where the defendants have agreed that a statement from an officer of the plaintiff certifying the amount of indebtedness shall be conclusive evidence of the amount due and payable. Such a certificate was issued and exhibited as "Wl4" to Wan Rosmawati's affidavit affirmed on 10 February 2015. The endorsement by the Federal Court in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685 on the great weight to be given to such clause by the court has not been whittled down by any subsequent cases from the apex court and the ratio of which must be applied to the detriment of the defendants here.

[11] The default on repayments of the banking facilities by the first defendant and all the defendants' failure to meet the demands made have been pleaded and that these are the facts upon which the plaintiffs cause of action rests. The date and the amount owing as at the date have also been pleaded and as I have just mentioned, the certificate of indebtedness as well. I failed to see therefore how the statement of claim can be said to be defective as alleged.

A Premature Claim

[12] Granted that the plaintiff has moved in to secure the charged properties and did not dispute that the value of the same was not less than the sum claimed, nevertheless the plaintiff has covered themselves well in the facilities agreement, the debenture and both types of guarantee, that they are entitled to commence concurrent proceedings or proceed with simultaneous or contemporaneous actions against the defendants for a monetary claim as well as a foreclosure proceeding against the charged plant and machinery (see cl. 26.4, cl. 22.16A and cl. 7A, respectively of the documents mentioned). For clarity, the said clause is reproduced below:

> You shall have the right to exercise all or any of the remedies available whether by this guarantee or by statute or otherwise and shall be entitled to exercise such remedies concurrently, including pursuing all

> remedies pursuant to this guarantee and civil suit against the customer or other security party to recover all money due and owing to you, provided that nothing herein contained shall be construed as imposing any obligation (whether at law or in equity) upon you to exhaust your remedy to enforce any of the securities or against any other security party before commencing any action against us and we hereby irrevocably and unconditionally agree and consent to you commencing separate proceedings, enforcing other remedies and exercising any other rights which you may have against us, the customer or any other remedies and exercising any other rights which you may have against us, the customer or any other security party simultaneously or consecutively in any order as you deem fit.

[13] The Federal Court have been upholding the right of the lender to commence these concurrent or simultaneous actions pursuant to this contractual provision and Mr Norman Liew has highlighted to me two of such decisions ie *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 and *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81; [2011] 1 MLJ 478 which defended the lender's right to go against the borrower with their gums blazing, so to speak. Again, I have no cause to distinguish the application of the *ratio* of the said cases to this one here and what was said by Gopal Sri Ram FCJ at p. 484 is relevant.

> lf the courts were to read such an agreement into the clauses in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? lt would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law.

[14] Thus the plaintiff has the full backing of the contractual provisions and the case law to commence this action against the defendants despite cl. 14 of the fixed debenture which provides that the first defendant is only liable for the shortfall between the value or proceeds from the sale of the charged property and the outstanding loan amount if any.

[15] Further, the plaintiff has submitted that the non-realisation security in the form of the charged properties was not the fault of the plaintiff – the first defendant was uncooperative by not providing the receivers with the statement of affairs as well as details of the charged properties and other relevant documents connected to them. The letters of such request demand are exhibited as W19, W20 & W21 to the affidavit of Wan Rosmawati affirmed on 24 March 2015.

Cost

[16] The defendants have agreed in the agreement and the guarantees to indemnify and bear the plaintiffs legal costs and charges resulting from their default. Mr Andy Tan submitted that since the agreement is to indemnify, the plaintiff must prove the actual costs incurred and he also submitted, that under O. 59 r. 22(1)(c)(iv) of said Rules 2012 what is allowed to them is cost of RM4,000 to RM15,000. Mr Norman Liew of course relied on the 13th Schedule of the Advocates' Remuneration Rules 1988 where the computation for cost is as follows:

Up to $50,000.00	8%
For the next $100,000.00	6%
For the next $400,000.00	4%
For the next $500,000.00	2%
For the next $1,000,000.00 and above	1%

[17] He acknowledged that based on the said computation the costs on solicitor and client basis should be RM99,347.95 not RM99,847.95, a difference of RM500 and asked that the cost be amended to replace the correct amount.

[18] With respect to Mr Andy Tan, given the agreement to pay cost on indemnity basis, I do not see reliance on the schedule of the Advocates' Remuneration Rules which is a subsidiary legislation to be misplaced. lf the cost claimed by the plaintiff is over and above that prescribed from the computation in the said schedule, I would agree that it is then subject to proof. Otherwise a strict reliance on a piece of legislation is fair and should be allowed. Since the oral amendment sought is to the advantage of the defendants, I would allow it as O. 18 r. 19(1) of the said rules gives me the power to either strike out or amend any pleading. lt would be nonsensical to allow the case to go for trial on that trivial issue of a difference in cost of RM500.

[19] Based on the above considerations, I am of the view that this is indeed a plain and obvious case to invoke the summary process under the said order as held by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation* [1993] 4 CLJ 7 and I would therefore allow the application of the plaintiff. Accordingly I enter judgment against the defendants as prayed in the statement of claim but with the amended cost. As for the cost of this application, in the absence of parties agreement to it, I fix the same at RM10,000.